No. 98-1172

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. and MARVIN GEISNESS,

Petitioners,

—v.—

IRENE HALLIGAN, as Executrix of the Estate of THEODORE H. HALLIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a securities industry employee who was required to arbitrate his claim of wilful age discrimination, is entitled to vacature of the arbitrators' award where NASD arbitrators, in denying his claim, were shown to have manifestly disregarded either the law or the evidence or both.

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STATEMENT OF THE CASE

Petitioners, Piper Jaffray, Inc., and Marvin Geisness seek a writ of certiorari, to appeal a decision of the U.S. Court of Appeals for the Second Circuit entered July 9, 1998 in *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197. Petitioners' application to this Court was made following the Second Circuit's denial of their motion for rehearing and suggestion of an *en banc* panel. Respondent herein is Irene Halligan, as Executrix of the Estate of Theodore Halligan.

In their unanimous decision, Circuit Judges Feinberg and Kearse and Hon. Barrington Parker, of U.S. District Court for the Southern District of New York, sitting by designation, reversed three orders of the District Court. Those orders which are annexed to Petitioners' brief, had (1) denied Mrs. Halligan's Petition to Vacate an NASD arbitrators' award which had dismissed her decedent's ADEA claim; (2) confirmed the arbitrators' award, and (3) dismissed on *res judicata* grounds, the Estate's ADEA action against Piper Jaffray, Inc.

The Second Circuit's reversal was based its determination that NASD arbitrators had manifestly disregarded either the law or the evidence or both in denying Theodore Halligan's ADEA claim. The Court also remanded the Executrix' Federal action to the District Court for further proceedings consistent with its ruling, stating that there was no *res judicata* bar to that proceeding. The Court noted in its decision that it had authority to remand the case to the arbitrators for a written opinion, but expressly declined to do so, based on the record before the Court. (The Second Circuit Court's decision is appended to Petitioners' brief as Appendix A.)

As shown in the record on Appeal, Respondent's decedent, Ted Halligan, had been employed as an institutional salesman in Piper's New York office for nineteen years, until his employment was terminated on December 31, 1992. (R-399).[1] Mr. Halligan was then 69 years old. During each of the years from 1987 through 1991, Piper had ranked Mr. Halligan as its No. 1 salesperson in commission production. In 1992, Mr. Halligan was ranked Number 5 among some twenty-five other institutional salespersons. (R-330-408).

In the summer of 1992, Mr. Halligan was asked to fly to Minneapolis for an August 27, 1992 luncheon meeting at Piper headquarters, with Tad Piper, CEO of Piper Jaffray and Bruce Huber, Mr. Halligan's immediate superior. At the outset of this meeting, both Bruce Huber and Tad Piper asked Mr. Halligan repeatedly when he was going to retire. Mr. Halligan responded that he was in great physical shape and at the top of his skills as an institutional salesman and had no plans to retire. Tad Piper then attempted to persuade Mr. Halligan to retire, citing the example of his father, Harry Piper. Tad Piper told Halligan that his father *"knew when it was time to turn over the reins to a young whippersnapper, me."* After Halligan pointed out that unlike himself, Harry Piper had $50 million dollars to retire on, Tad Piper finally said to Halligan: *"You're too old, our clients are young and they want to deal with younger salesmen."* Shortly thereafter, Tad Piper left the meeting and Halligan said to Huber, *"It looks like you want me out of here as quickly as possible."* Huber said "*Yes.*" Halligan made notes of this conversation on the trip back to New York. (R-119, R-426-427)

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[1] References are to the record filed in the U.S. Circuit Court of Appeals for the Second Circuit.

Two weeks later, on September 10, 1992, Mr. Halligan received a phone call from Bruce Huber who said to him: *"In accordance with our conversation the other day, we want you out of Piper Jaffray, by the end of the year."* Halligan asked Huber if he would be fired if he did not get out and Huber replied that if he did not resign, both he and Tad Piper would fire him. Halligan asked if he could stay until the end of December and Huber agreed. Mr. Halligan made notes of this conversation. (R-128, R-428)

During the fall of 1992, Mr. Halligan looked for comparable employment without success. (R-428) In October, 1992, Halligan retained counsel. (R-429) In November, his attorney wrote to Tad Piper threatening legal action if Mr. Halligan was fired. (R-130, R-429) About this time, Halligan approached Huber while he was attending a conference in New York City and asked Huber if he could keep his job. Huber said it was out of the question. (R-429)

Huber transferred Mr. Halligan's sales partner, Marvin Geisness, then in his early forties, to Minneapolis, but did not offer Halligan such a transfer. On December 31, 1992, Mr. Halligan was removed from the payroll and the New York office was shut down. (R-451) In January and February 1993, Piper hired two institutional salesmen, Ron Reiches, 41 and Christopher Whitcomb, 27, noting on their personnel records that they were "replacements for Ted Halligan". (R-131, R-132) Halligan filed a claim of age discrimination with the EEOC on January 15, 1993, two weeks after he was fired. (R-351)

In 1991, the U.S. Supreme Court had ruled in *Gilmer v. Interstate Johnson,* 500 U.S. 20, that a securities industry employee who executed a U-4 registration statement, agreeing to arbitrate disputes with his employer, could be compelled to

arbitrate his ADEA claim at the New York Stock Exchange. Mr. Halligan had signed an identical U-4 and was, like Gilmer, registered at both the New York Stock Exchange and the NASD. Moreover, Piper's House Counsel advised Mr. Halligan's counsel in December of 1992 that if Halligan filed an action, Piper would move to compel arbitration. Having no other choice, Mr. Halligan filed his ADEA claim in arbitration at the NASD in October, 1993.

Hearings began at the NASD in September of 1994 and ended in October, 1995. In March, 1996 the arbitrators denied Mr. Halligan's claims without opinion. In or about June of 1996, Respondent Irene Halligan, as Executrix of the late Theodore Halligan, filed a Petition to Vacate the award in arbitration in the U.S. District Court for the Southern District of New York. On October 1, 1996, the Estate filed an ADEA action in the Federal District Court. As stated supra, the District Court confirmed the award and dismissed the lawsuit. Mrs. Halligan then appealed to the Second Circuit.

MISSTATEMENTS IN PETITIONER'S BRIEF

1. Petitioners repeatedly allude in their brief to the "efficiency" of arbitration and its usefulness in allowing parties "to avoid the costliness and delays of litigation". In this case, however, arbitration was neither efficient nor inexpensive. Mr. Halligan was required to pay the NASD $2,000.00 in order to file his claim in arbitration.

Moreover,while the proceedings were conducted on 26 different dates, the average "day" at the NASD consisted of two "sessions" totaling about 5 hours of testimony, the balance of the time being consumed by morning and afternoon breaks and the luncheon recess. Moreover, the arbitrators did not work

beyond 4:00 p.m. and sessions could only be scheduled when the arbitrators' personal schedules permitted. As a result, the case was regularly adjourned for one, two or three month intervals. In July, 1995, the arbitrators adjourned the case for three months, to October 18, 1995. On October 9, 1995, Mr. Halligan died. His widow, Irene Halligan, continued the arbitration which concluded at the end of October, 1995. Doubtless, in a Courtroom, this trial would have taken two weeks.

2. Petitioners' description of the proceedings as "hotly contested" is misleading, as is the term "experienced attorney arbitrators". The proceedings were conducted with great civility at all times. Moreover, according to their resumes, none of the arbitrators had any experience with employment discrimination cases.

3. At page 5 of their brief, Petitioners cite several cases as examples of the similar approach in other Circuits to the Second Circuit's application of the doctrine of manifest disregard of the law. However, not all of these cases concern that doctrine, including *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 [concerning modification of an award]; *Trans Chemical Limited v. China National Machinery Import & Export*, 161 F.3d 314, (5th Cir. 1998) [concerning vacature under 9 U.S.C. 10(a)1]; *Baravati v. Josephthal,Lyon & Ross*, 28 F.3d 704, 706 (7th Cir. 1994) [soundly rejecting manifest disregard doctrine].

4. Petitioners also state at ftnt. 4, at page 18 of their brief that the Second Circuit ultimately concluded that Mr. Halligan's claim *"would have been subject to a valid motion to compel arbitration had he attempted to litigate it."* Petitioners have misstated the Court of Appeals' ruling. At ftnt. 2 of its

opinion, (Petitioners' Appendix A, p. 9a) the Court of Appeals ruled that *"In light of our current caselaw, Halligan was correct in considering himself bound to arbitrate."*

REASONS FOR DENYING THE WRIT

The Writ should be denied for three reasons:

(1) The U.S. Court of Appeals for the Second Circuit has not created a new standard of review for vacating awards in arbitration in deciding the *Halligan* case since the Court's decision was based on well recognized standards for judicial review of arbitration awards.

(2) The Second Circuit Court of Appeals did not create a split in the Circuits by its decision in *Halligan v. Piper Jaffray, Inc.* Manifest disregard of the evidence is not the equivalent of erroneous factual findings by arbitrators. No other circuit court has confirmed an arbitrators' award where arbitrators were found to have manifestly disregarded either the law or the evidence presented to them, or both.

(3) For the reasons stated above, the vacature of this arbitration award on the standards utilized by the Second Circuit in this case does not call into question any well settled area relating to judicial review of arbitration awards, nor is it of national significance.

POINT I

NO NEW STANDARD OF JUDICIAL REVIEW WAS CREATED BY THE SECOND CIRCUIT COURT OF APPEALS IN THE *HALLIGAN* DECISION

The Second Circuit's decision does not, as Petitioners contend, "expand the focus of the "manifest disregard" standard beyond arbitrators' conclusions of law and into their findings of fact". To begin with, the NASD arbitrators who heard Mr. Halligan's ADEA claim, made neither findings of fact, nor conclusions of law.

Moreover, the Second Circuit's decision is based on well recognized standards of judicial review. An award in arbitration may be vacated by a Federal Court for any of the reasons contained in the Federal Arbitration Act, 9 U.S.C. 10(a) or where arbitrators manifestly disregard the law in rendering their award. *Wilko v. Swan,* 346 U.S. 427, 436-37 (1953), overruled on other grounds in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Notably, Petitioners do not contend that the Second Circuit Court of Appeals erred in ruling that NASD arbitrators "manifestly disregarded the law" in the *Halligan* case. Instead, they complain that the Court of Appeals created and utilized an impermissible standard of review called "manifest disregard of the evidence." However, as seen *infra*, this argument is a wholly meritless attempt to wring substance out of form.

As noted by Petitioners, the "manifest disregard of the law" standard is a creature of Federal caselaw and traces its origins to *Wilko v. Swan,* id. In the *Halligan* case, the "law"

which the arbitrators were obligated to enforce was the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, together with those Supreme Court and other Federal Court precedents which have interpreted that statute.

That law has established specific standards of proof for Plaintiffs and Defendants in all employment discrimination cases. *McDonnell Douglas v. Green,* 411 US. 792 (1973); *Texas Dept. Community Affairs v. Burdine,* 450 U.S. 288 (1981); *Price Waterhouse v. Hopkins,* 490 U.S. 288, (1989). Moreover, these evidentiary standards of proof may not be disregarded by arbitrators charged with enforcing Federal statutes. *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ["By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial forum."]

The substantive rights afforded by the ADEA include the Plaintiff's right to establish his *prima facie* case of age discrimination either by direct evidence of age discrimination or by offering a minimum quantum of proof, i.e. by establishing that he was over 40 years of age and thus a member of the class protected under the ADEA, that he was qualified for his job, that he was discharged, and that he was replaced in his job by a significantly younger person. *Benjamin v. United Merchants & Manufacturers,* 873 F.2d 41 (2nd Cir., 1989). When this *prima facie* case is established, a presumption of discriminatory intent arises because the Court presumes that the act of discharge, if unexplained, is more likely than not to be based on the consideration of impermissible factors. *Furnco Construction Corp. v. Waters* 438 U.S. 567, 577 (1978).

Once a *prima facie* case of discrimination is created, the law imposes upon the Defendant the burden of rebutting that presumption by producing evidence that it acted for a non-discriminatory reason. Moreover, Defendant's evidence must be sufficient to raise a genuine issue of fact as to whether it discriminated. *Texas Dept. of Community Affairs v. Burdine* 450 U.S. 248 (1981).

As may be seen, the law requires close analysis of the evidence at every stage of the proceeding, since Plaintiff's failure to establish his prima facie case requires dismissal of the claim and Defendant's failure to rebut the presumption of discrimination requires a directed verdict for the Plaintiff. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

As a consequence, arbitrators who ignore the evidence in an ADEA case perforce ignore the law. The Second Circuit's statement that the arbitrators "either manifestly disregarded the law, or the evidence, or both" is thus not a new standard of review. It is patent that whether an arbitrator who is well aware of the law, refuses to apply the law to the evidence or simply disregards evidence that the law was violated, the result is exactly the same: the arbitrators have manifestly disregarded the law.

Petitioners' brief states at page 11 that "there was intense factual disagreement on virtually every material point, including matters as rudimentary as whether Mr. Halligan was fired or voluntarily resigned." This is not so. In addition to the fact that Mr. Halligan provided overwhelming direct evidence of age discrimination, there was no factual disagreement between the parties as to any of the material elements of Mr. Halligan's *prima facie* case. The record adduced by both sides demonstrated that Halligan established his *prima facie* case

under the *McDonnell Douglas* paradigm, but that Piper nonetheless failed to rebut the presumption of discrimination created by that *prima facie* case, or even to articulate, much less establish, a non-discriminatory reason for Halligan's discharge.

Halligan, at age 69, was clearly in the protected class of ADEA plaintiffs. Also, Piper did not deny that within weeks of Halligan's discharge it hired two younger institutional salesmen (ages 27 and 41) as "replacement(s) for Ted Halligan". (R-131, 132) Moreover, even Piper agreed that Halligan was qualified for his job:

> "Piper has never tried to show in any way that Mr. Halligan was incompetent or unsatisfactory." (From summation argument by Piper Jaffray at NASD, (R-700).

As to whether he was "fired" on September 10, 1992, as Halligan testified, or had opted to "retire" on that date, as Piper claimed, as seen *infra*, even the testimony of Piper witness, Bruce Huber, established that Halligan was fired.

Thus, Petitioners' contention that the only possible reading of the Second Circuit's opinion is that "it created and applied a heightened inquiry into the factual underpinnings of arbitral awards" is meritless. The Second Circuit was required to review this case to assure that the arbitrators complied with the requirements of the statute. Faced with overwhelming evidence of age discrimination including direct evidence of age discrimination from at least four witnesses, it hardly required "heightened scrutiny" for the Court to ascertain that justification for the denying relief under the ADEA could not be found in this record.

Moreover, it is clear from the Second Circuit's opinion that it intended to and did apply the manifest disregard of the law standard, in vacating the arbitrators' award. As the Court stated in its opinion: [2]

> "Mrs. Halligan argued in the district court and repeats to us that the arbitration award reflected manifest disregard of the law. Mrs. Halligan makes a strong case for that proposition. Quite simply, Halligan presented overwhelming evidence that Piper's conduct after Tad Piper became CEO was motivated by age discrimination.
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> * * *
>
> "Moreover, this is not a case like DiRussa where we refused to find "manifest disregard" because DiRussa had not sufficiently brought the governing law to the attention of the arbitrators. There is no such problem here." (Petitioners' Appendix A, p. 16b)

It should also be noted that arbitrators who "manifestly disregard evidence" risk vacature of their award for that reason alone, under the Federal Arbitration Act (FAA) 9 U.S.C. Sec. 10(a)3. FAA Sec. 10(a)3 provides that an arbitrator's award may be vacated whenever arbitrators are guilty of any misconduct which is prejudicial to the rights of a party, including refusing to hear evidence which is pertinent and material to the controversy. See *In Matter of the Arbitration*

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[2] The full text of the Second Circuit Court's opinion in *Halligan v. Piper Jaffray, Inc.*, is annexed to Piper Jaffray's Petition as Appendix A.

between Tempo Shain Corporation v. Bertek, Inc., 120 F.3d 16 (2d Cir., 1997). [Arbitrators' award vacated because arbitrators had no reasonable basis for refusing to permit witness to testify.] Clearly, for arbitrators to manifestly disregard evidence is the equivalent of refusing to hear evidence and would doubtless constitute arbitrator misconduct of equal gravity, warranting vacature under 9 U.S.C. 10(a)3.

POINT II

THE SECOND CIRCUIT DID NOT INTRUDE ON THE ARBITRATORS' ROLE AS FACT FINDER.

Second Circuit precedents demonstrate full support for the longstanding Federal policy favoring arbitration of disputes. Indeed, no other Circuit Court has more narrowly applied the manifest disregard of the law standard. See *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (2d Cir. 1997); [If there is even a barely colorable justification for the outcome reached, reviewing Court must confirm the award.] *Di Russa v. Dean Witter Reynolds, Inc.* 121 F.3d 818, (2d Cir., 1997), cert. denied, 118 S.Ct. 1695 (1998). [Although the ADEA mandates an award of reasonable attorneys' fees in addition to judgment, arbitrators held not to have manifestly disregarded the law in denying such fees, since it was plausible that arbitrators understood the phrase "entitled to", as meaning they should exercise their discretion to award attorneys' fees.]

Following its decision in the *Halligan* case, the Second Circuit has continued to adhere to its narrow interpretation of the "manifest disregard of the law" standard and has, moreover, specifically declined to apply a heightened standard of review in

cases of statutory claims submitted to arbitration. In an unpublished opinion in *Chisolm v. Kidder, Peabody Asset Management, Inc.*, 1998 U.S. App. Lexis 22385, (Respondent's Appendix A), filed two weeks after the *Halligan* decision, the Second Circuit refused to vacate an NASD arbitrators' award which denied Plaintiff's claim of age discrimination.

The Plaintiff in *Chisolm* contended that the District Court had erroneously rejected his argument that the "manifest disregard of the law standard" should not be applied to cases where arbitrators construed Federal statutes, but instead there should be heightened scrutiny of such awards. In *Chisolm v. Kidder Peabody Asset Mgmt.*, 966 F. Supp. 218 (SDNY 1997) Judge Constance Baker Motley had, in a lengthy opinion, confirmed the arbitrators' award on the manifest disregard standard, and declined to apply a heightened standard of review. The Court of Appeals for Second Circuit affirmed, stating:

> "It is well settled in this Court that a District Court may vacate an award in arbitration if it is in manifest disregard of the law; however the reach of that doctrine is severely limited. (citing) *Halligan v. Piper Jaffray, Inc.* ... 1998 WL 38559 at *5 (2d Cir., 1998). (Respondent's Appendix A)

The Court further stated that, unlike the *Halligan* case, the NASD arbitrators in *Chisolm* were not shown to have manifestly disregarded the law in denying Plaintiff's ADEA claim, because the record contained ample evidence from which they could have concluded that the Defendant had a legitimate, non-discriminatory motive for discharging Plaintiff.

The *Chisolm* case, which was not cited by Petitioner in its brief, clearly demonstrates that the Second Circuit continues to apply the narrow manifest disregard of the law standard of judicial review for statutory claims submitted to arbitration. It also demonstrates that the Second Circuit decided *Halligan* under that narrow standard and did not, despite Petitioners' contention, "alter the existing standard of review" for such awards.

While the manifest disregard standard is quite narrow, it is not, as Petitioners seem to think, merely an illusion. As the Second Circuit noted in *Chisolm*: ***"We have recently demonstrated in Halligan that the manifest disregard standard is not without teeth".***

It is also clear from the Second Circuit decisions cited above, that justification for an award, even if barely colorable, must be sourced in the record, and not in speculation as to why the arbitrators might have made the award.

Petitioners' contention that the arbitrators' denial of Mr. Halligan's ADEA claim was based on witness credibility is just such speculation, because nothing in the record supports that conclusion.

Indeed, the record shows that the only significant conflict in the case, i.e., as to whether Halligan had voluntarily resigned or was fired was more apparent than real.

Piper witness Bruce Huber initially testified that Halligan told him on September 10, 1992, that he *would* retire at the end of December, during a phone conversation. (R-483) Huber also testified, however, that Halligan had changed his mind about retiring by mid-November, 1992 when he met Halligan in New York at a business conference. Huber testified

that Halligan asked if he could keep his job at this time and that he told Halligan that he could not stay because it was too late to reconsider, since plans had already been made to close the New York office. (R-492, p. 2468)

These "plans" consisted of giving notice to Halligan's secretary and the receptionist. Huber also admitted that he did not offer Halligan an opportunity to work out of the Minneapolis office, although Huber transferred Halligan's partner, Marvin Geisness, to Minneapolis where he continued to cover New York accounts. (R-492, p. 2467). Huber closed down the New York office on December 31, 1992 and removed Halligan from the payroll. (R-492, p. 2471).

Thus, Huber's own evidence, even if believed, also proved that Halligan was fired and did not resign. Huber testified that Halligan said he *would* resign in December 1992, but had changed his mind about resigning by November, 1992. Piper does not dispute that Halligan was still employed in November of 1992 when Huber told him he could not keep his job. Thus even Huber confirmed that Halligan did not resign, but was discharged as of December 31, 1992, the only issue being whether Halligan was fired on September 10, 1992 as Halligan testified, or if Huber's testimony were credited, in November of 1992 when Huber told Halligan he had to leave.

Moreover, Petitioner points to nothing in the record which would support its conclusion that the arbitrators did not believe Halligan's witnesses. Nor can such a conclusion be reasonably inferred from this record. As may be seen from the Court of Appeals' opinion in *Halligan* there was nothing in the record to support such an inference:

> "Piper argues that the arbitration panel resolved the case in accordance with the substantive

> ADEA statute, for example, it credited Piper's witnesses instead of Halligan's. Had the arbitrators offered that explanation of the award, on this record it would be hard to accept—but they did not even do that." (Patitioner's Appendix A, 17a)

As stated in the Court's opinion, Huber was contradicted by other Piper witnesses on key elements of his testimony. The Court noted that while Bruce Huber testified that Halligan's partner, Marvin Geisness, was not informed of the August 27, 1992 meeting among Tad Piper, Bruce Huber and Ted Halligan before it took place, Geisness testified that he had discussed the August 27th meeting with Huber beforehand and had asked him not to close the New York office.

While the Court of Appeals cited only one example of such contradictory testimony, the record before the Court disclosed several other instances in which Huber's testimony was contradicted by Piper witnesses.

In sharp contrast to Piper's witnesses, none of Halligan's witnesses contradicted one another. Moreover, as Mrs. Halligan pointed out to the District Court and the Court of Appeals, Piper's main witnesses, Tad Piper and Bruce Huber confirmed the accuracy of major portions of Halligan's testimony regarding their conversations at the luncheon meeting of August 27, 1992. (R-681-683) Thus, a reviewing Court looking for justification based on "credibility" of witnesses could not find "even a barely colorable justification" for the award on this ground in the record of the *Halligan* case.

POINT III

THE SECOND CIRCUIT'S DECISION DOES NOT REPRESENT A SPLIT IN THE CIRCUITS NOR IS IT OF NATIONAL SIGNIFICANCE.

Petitioners' claim that the Second Circuit's opinion in *Halligan v. Piper Jaffray, Inc.*, creates a split in the Circuits is wholly erroneous. No other Circuit Court has permitted an arbitration award to stand where arbitrators have either manifestly disregarded the law or the evidence or both in deciding a claim in arbitration. Moreover, Petitioners cite no case in which errors in fact made by arbitrators have been deemed to be the equivalent of a manifest disregard of the evidence by any Court.

The Second Circuit's vacature of the arbitrators' award in *Halligan* is clearly based upon precepts set out in the Supreme Court's decision in *Gilmer v. Interstate Johnson*, 500 U.S. 20 (1991):

> "...in *Gilmer*, when the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, the Court did so on the assumptions that claimant would not forego the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in arbitration. 500 U.S. 26,28. This case puts those assumptions to the test. The Court also stated in *Gilmer* that "claimed procedural inadequacies" in arbitration "are best left for resolution in specific cases." 500 U.S. at 33. At least in the

> circumstances here, we believe that when a reviewing Court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so we are left with the firm belief that the arbitrators here manifestly disregarded the law, or the evidence or both." (Petitioners' Appendix A, 16a, 17a.).

As seen *supra*, the Court's decision to take the absence of an arbitrators' opinion into consideration in determining whether the arbitrators manifestly disregarded the law, is tailored to the unique circumstances presented by the *Halligan* case and based on the clear teaching of *Gilmer* that claimed procedural inadequacies are best left for resolution in specific cases.

Thus, Petitioners' contention that after *Halligan v. Piper Jaffray*, arbitrators who decline to issue opinions in close cases will "do so at their peril," is totally unfounded. The Second Circuit specifically stated in *Halligan*, that its ruling was not intended to require that arbitrators write opinions:

> "We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing Court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation if given, would have strained credulity, the absence of explanation may reinforce the reviewing Court's confidence that the arbitrators engaged in

> manifest disregard of the law. (Petitioners' Appendix A, p. 17a)

As can be seen, the Second Circuit's opinion neither requires arbitrators to write opinions, nor does it pose a threat to the finality of arbitration in the United States. Moreover, its opinion is wholly consistent with the Supreme Court's decision in *Shearson American Express v. McMahon* 482 U.S. 220, 232 (1987) which assures a judicial review of statutory claims submitted to arbitration which is sufficient to assure that the statute was enforced in arbitration. The Second Circuit's ruling in *Halligan* is also consistent with the Supreme Court's earlier ruling in *Wilko v. Swan,* 346 U.S. 427, (1953) overruled on other grounds in *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477 (1989), which permits vacature of awards which are made in manifest disregard of the law.

CONCLUSION

Ted Halligan submitted his ADEA claim to arbitration in 1993, because he believed himself compelled to do so by the Supreme Court's decision in *Gilmer v. Interstate Johnson*, 500 U.S. 20 (1991). In so doing, he relied on the Supreme Court's assurances that he was entitled to a judicial review of the arbitrators' decision on that claim which would be sufficient to ensure that his statutory rights were vindicated in arbitration.

Petitioners now seek to nullify Mr. Halligan's right to such judicial review, but not on the grounds that NASD arbitrators properly denied Halligan's ADEA claim. Rather, Petitioners' concern is that some other litigant who was compelled to arbitrate a statutory claim of employment discrimination may be emboldened by *Halligan* to seek review of an arbitrators' award. In Respondent's view, that motive is not worthy of consideration

by this Court in determining whether a writ of certiorari should issue in this case. Wherefore, Respondent, Irene Halligan, as Executrix of the late Theodore Halligan, respectfully requests that this petition for a writ of certiorari be denied in all respects.

Respectfully submitted,

Kathleen M. O'Connell
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Appendix A

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CHISOLM v. KIDDER PEABODY ASSET MGMT., DATED AND DECIDED JULY 28, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28 day of July one thousand nine hundred and ninety eight

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PRESENT: RICHARD J. CARDAMONE,
JOSÉ A. CABRANES,
GERALD W. HEANEY,*
Circuit Judges,

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* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation

Appendix A

O. BIERNE CHISOLM
Plaintiff-Appellant,

v. No. 97-7828

KIDDER, PEABODY ASSET MANAGEMENT, INC. and KIDDER, PEABODY & CO.INC.,
Defendants-Appellees,

APPEARING FOR APPELLANT:
JEFFREY L. LIDDLE, Liddle & Robinson LLP, New York, New York

APPEARING FOR APPELLEES:
MARK S. DICHTER, Morgan, Lewis & Bockius LLP, Philadelphia, Pennsylvania

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This cause came on to be heard on January 26, 1998 on the transcript of record from the United States District Court for the Southern District of New York (Constance Baker Motley, *Judge*) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff, a former employee of Kidder, Peabody & Co., Inc. ("Kidder, Peabody"), commenced this action to redress alleged age discrimination by defendants, seeking relief under the Age Discrimination in Employment Act of 1967, § 2 *et seq.*, as amended, 29 U.S.C. § 621 *et seq.*, (the "ADEA"). Plaintiff claims that, after a career that spanned several decades at Kidder, Peabody, he was constructively discharged due to the actions of George Grune, the 35-year-old director of Kidder, Peabody Asset Management, Inc., who allegedly demonstrated favoritism toward

younger executives, significantly diminished plaintiff's job responsibilities, and denied him a bonus in 1991 (which, in the previous years, had constituted approximately 40-50% of plaintiff's salary). In response, plaintiff resigned, later claiming constructive discharge.

In 1991, plaintiff filed an action in New York Supreme Court alleging state law claims, and defendants moved to stay the action and compel arbitration.[1] The court granted defendants' motion and compelled arbitration, whereupon plaintiff filed the instant action, alleging violation of the ADEA in district court in January 1992. Once again, defendants moved for a stay, and the district court granted the motion and compelled arbitration. After 43 hearing sessions before an arbitration panel of the National Association of Securities Dealers, the panel dismissed plaintiff's claims in their entirety without issuing findings of fact, conclusions of law, or the rationale behind its decision. On May 29, 1997, the district court affirmed the decision of the arbitration panel. *See Chisolm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218 (S.D.N.Y. 1997). From this judgment, plaintiff appeals, arguing that the district court erroneously rejected his argument that the "manifest disregard of the law" standard for vacating an arbitration award should not apply in cases where arbitrators construe federal statutes rather than decide issues typical of commercial or labor disputes.

"In reviewing a district court decision confirming an arbitration award, we review legal conclusions *de novo* and findings of fact for clear error." *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1998).

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[1] In order to be registered with various securities exchanges as a securities representative, plaintiff was required to sign the Uniform Application for Securities Industry Registration Form, which contained an arbitration agreement.

Accordingly, we review *de novo* the legal issue of whether the district court applied the correct standard of review to the arbitration panel's decision. *See First Options v. Kaplan*, 514 U.S. 938, 948 (1995). It is well settled in this Circuit that a district court may vacate an arbitration award if it is in "manifest disregard of the law"; however, the "reach of the doctrine is "severely limited." *Halligan v. Piper Jaffray, Inc.*, No. 97-7801, 97-7839, 1998 WL 385539, at *5 (2d Cir. July 9, 1998) (quoting *Government of India v. Cargill, Inc.*, 867 F.2d 130, 133 (2d Cir. 1989).[2] Such manifest disregard "clearly means more than error or misunderstanding with respect to the law." *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Specifically, a court should not vacate an award unless it finds "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored

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[2] In addition, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, provides that an arbitration award may be vacated.

(1) Where the award was procured by corruption, fraud or other undue means.

(2) Where there was evident partiality or corruption in the arbitrators....

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final, and definite award upon the subject matter submitted was not made.9 U.S.C. § 10(a)(1)-(4). These statutory provisions do not pertain to the circumstances of this appeal.

by the arbitrators was well defined, explicit and clearly applicable to the case." *Id.*

We have recently demonstrated in *Halligan* that the "manifest disregard" standard is not without teeth. See 1998 WL 385539. However, in the circumstances here presented, we do not find a basis for concluding that the arbitration panel "ignored the law or the evidence or both." *Id.* at *7. Unlike *Halligan*, where there was "strong evidence that Halligan was fired because of his age, *Id.*, there was "ample basis [in the instant case] from which to conclude that...plaintiff was not constructively discharged," and even assuming, *arguendo*, that he was, "there [was] also evidence from which the arbitrators could have concluded that defendants had legitimate, nondiscriminatory reasons for doing so." *See Chisolm*, 966 F. Supp.at 228-29.

Having carefully considered all of plaintiff's arguments on appeal, we AFFIRM the judgment of the district court in its entirety, substantially for the reasons stated by Judge Motley in her opinion. *See Chisolm*, 966 F. Supp. at 218.

FOR THE COURT
Carolyn Clark Campbell, Clerk

By Lucille Carr /s/

Appendix B - Relevant Statutes

Sec. 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive, or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.